(1) Supreme Court, U.S.
FILED

No. 03 347 SEP 2 2003

In The

Supreme Court of the United States

ALPHONSO CORNELIUS,

Petitioner,

v.

UNITED PARCEL SERVICE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

ISIDRO M. GARCIA
GARCIA, ELKINS & BOEHRINGER, P.A.
THE HARVEY BUILDING
224 Datura St., Suite 900
West Palm Beach, FL 33401
(561) 832-8033 (telephone)
(561) 832-7137 (telecopier)
Florida Bar No. 437883

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

1. Can an appeals court nullify a jury's verdict for a terminated employee in a Title VII retaliation case based solely on an employer's subjective claim that its alleged decision-maker – who did not testify at trial – believes that the employee committed a terminable offense, or does such a factual finding by an appeals court violate Petitioner's constitutional right to trial by jury?

STATEMENT REQUIRED BY RULE 14.1

Pursuant to Supreme Court Rule 14.1, the parties in the proceedings below were Alphonso Cornelius and United Parcel Service.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Alphonso Cornelius respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is unreported and is reprinted in the Appendix to this Petition ("App.") at 1-9. The order of the trial judge is reprinted at App. 10-26.

JURISDICTION

The court of appeals entered judgment on May 19, 2003. App. 1. Justice Kennedy extended the time for filing the petition for a writ of certiorari to and including September 1, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment VII:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-3(a):

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment [. . .] because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a):

It shall be an unlawful employment practice for an employer –

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Rule 50, Federal Rules of Civil Procedure:

(a) Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally

sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment – and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned:

(A) order a new trial, or

(B) direct entry of judgment as a matter of law.

(c) Granting Renewed Motion for Judgment as a Matter of Law; Conditional Rulings; New Trial Motion.

(1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered shall be filed no later than 10 days after entry of the judgment.

(d) Same: Denial of Motion for Judgment as a Matter of Law. If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds

entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

STATEMENT OF THE CASE

A. Procedural Background

Petitioner filed a one-Count Complaint against Respondent alleging that Respondent fired him because he engaged in protected activity in violation of Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991. Petitioner tried his case to a jury from February 28, 2001 to March 6, 2001. The jury found for Petitioner on all claims and returned a verdict for Petitioner in the amount of $300,000.00.

During trial, at the close of Respondent's case and again at the close of all evidence, Respondent moved for judgment as a matter of law.[1] The trial judge denied both motions and sent the case to the jury for resolution. After

[1] Initially, Respondent moved for judgment as a matter of law at the close of Petitioner's case-in-chief, at which point the trial judge reserved ruling. Respondent failed to move for judgment as a matter of law at the close of its own case, but the trial judge allowed Respondent to preserve such a motion when Respondent realized its oversight during Petitioner's rebuttal case. The trial judge denied all motions for judgment as a matter of law at the close of the evidence.

the jury returned its verdict for Petitioner, the trial judge entered Final Judgment for Petitioner.

On March 28, 2001, Respondent filed a post-verdict motion for judgment as a matter of law[2] raising the same arguments which it raised, and which the trial judge rejected, at the close of the evidence. Respondent's post-verdict motion argued, in part, that Petitioner failed to establish a *prima facie* case of retaliation. Petitioner timely opposed the motion. Nine months later, the trial judge granted Respondent's post-verdict motion for judgment as a matter of law thus nullifying the jury's verdict. The only reason the trial judge cited for its post-verdict decision was its finding that Plaintiff failed to establish a *prima facie* case of retaliation.

Petitioner timely appealed the trial judge's order granting Respondent's post-verdict motion to the United States Court of Appeal for the Eleventh Circuit. Respondent did not file a cross-appeal. On appeal, Petitioner challenged the trial judge's decision based on this Court's decision in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983) which precludes the trial judge from revisiting the sufficiency of a *prima facie* after the trial judge has denied a motion for judgment as a matter of law at the close of the evidence.

The appellate court did not address the trial judge's erroneous post-verdict conclusion that Petitioner failed to

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[2] Respondent also filed motions for remittur and/or for new trial. The trial judge denied both motions as moot. Respondent failed to pursue a decision on the merits of either motion and did not appeal or cross-appeal the denial of either motion.

establish a *prima facie* case. Instead, the appellate court conceded that Petitioner established a *prima facie* case, but held that Respondent was entitled to judgment as a matter of law because the employer claimed that its decision-maker – who did not testify at trial – believed that Petitioner committed a terminable offense.

B. Factual Background

Petitioner, an African-American male, worked for Respondent, initially as a warehouse driver and primarily as a driver, for approximately eleven (11) years from July of 1988 until April of 1999, when Respondent fired him. In November of 1998, Petitioner complained to Respondent that his supervisor, Jeff Whitney, was engaging in race discrimination. Specifically, Petitioner complained that Jeff Whitney made racist remarks about "niggers" in the workplace and disciplined Petitioner for workplace conduct but did not discipline a white co-worker for the same incident. Petitioner testified that he was offended by Whitney's remarks and feared that Whitney's recent disciplinary action was based on his racial bias. Additionally, Petitioner's sworn description of his race discrimination complaint about Jeff Whitney, admitted into evidence without objection, stated in relevant part: "In October of 1998 Jeff Whitney told me racist comment [sic] which he told all minority [sic]. [. . .] About two weeks later Jeff [Whitney] told me he was going to give Steve [illegible] a warning letter and did not, but was giving me [sic] warning. So I reported the comments he had been making to me about niggers to his boss manager Ralph Terrell." Terrell, who testified by deposition only in Petitioner's case-in-chief, conceded that Petitioner's complaint was one of "race discrimination." Respondent questioned Jeff Whitney

about Petitioner's complaint. Respondent conceded at trial that Whitney admitted Petitioner's allegations were true.

In the months that followed Petitioner's race discrimination complaint, Petitioner testified that a pattern of retaliation against him emerged, culminating in Respondent accusing Petitioner of sexual harassment in April of 1999. Petitioner said that shortly after he complained, his co-workers began harassing him. According to Petitioner, the harassment was not limited to verbal threats and included interference with Petitioner's equipment and packages. According to one of Petitioner's co-workers, the harassment was so severe that "if [the co-workers] could have got a hold of [Petitioner] they [. . .] would have gone [sic] do something to him[.]" Petitioner testified that he asked to report later for work to avoid the harassment at a joint morning meeting. Respondent gave him permission but then revoked permission after a week or two despite Petitioner's need for separation from his harassing co-workers. Petitioner offered evidence that Respondent did not take disciplinary action against the co-workers even though managers knew that 90 percent of Petitioner's co-workers were angry at Petitioner because he complained about Jeff Whitney's racial bias.

Respondent alleged that Petitioner sexually harassed a female, Debra McGee, when Petitioner and another of Respondent's male employees, Charlie Fox, spoke to McGee while picking up packages. Petitioner and Charlie Fox were the only persons with first-hand knowledge who testified about what occurred – or, more importantly, did not occur – during Petitioner's conversation with McGee and Fox. Respondent never called McGee to testify at trial. Fox testified that McGee talked to Petitioner about her divorce and told Petitioner that her husband cheated on

her. Although Fox also testified that Petitioner asked McGee whether she had any Black in her and whether she'd like some, Petitioner testified that his remarks were made to Fox, not McGee.[3] Debra McGee – who did not testify at trial – never worked for Respondent and did not initiate any complaint against Petitioner. Instead, McGee's supervisor, Arlene Ramos, told Respondent about Petitioner's alleged interaction with McGee during a single delivery. Ramos made no allegations that Petitioner engaged in severe or pervasive unwelcome sexual advances, that Petitioner made any other unwelcome remarks on other occasions, or that Petitioner's conduct, in any other manner, constituted sexual harassment under federal or state law. Moreover, Petitioner's unrebutted testimony was that McGee made sexually inappropriate remarks to him about wanting to engage in sex with Respondent's employees.

After Respondent removed Petitioner from his shift for alleged sexual harassment, Petitioner sent an investigator, Stan Purvis, to interview McGee. Purvis obtained a

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[3] Incredibly, the appellate court drew inferences about these remarks in Respondent's favor, and "found" that Petitioner "admitted at trial that he made the following remarks directly to McGee or in her presence: 'Why don't you try a black guy?' 'Do you have any black in you? Do you want some?' " App. 4. In fact, Petitioner testified that while he and McGee were talking about marriage – which conversation she initiated by talking about her divorce and how much she hated men – he asked McGee "Why don't you try a black guy." At employers' urging, fact finders *must* consider context when determining whether remarks constitute "sexual harassment." Remarkably, the appellate court applied a completely different standard to Petitioner and made a factual finding that his remark to McGee about marriage and his remark to Fox, a male co-worker who never complained about Petitioner, constituted "sexual harassment."

statement from McGee describing her interaction with Petitioner during the single delivery. Later, Respondent sent Purvis to interview McGee again to make sure that she was "comfortable" with her statement. During the second interview, McGee's version of events changed to include allegations that Petitioner made sexually explicit remarks to her during his single visit. However, at no time did McGee's statement allege that Petitioner engaged in conduct which constitutes sexual harassment. Nevertheless, Respondent allowed McGee to substantively change her statement with Ramos's assistance and, on April 29, 1999 – the same day Respondent received McGee's second, altered, statement – Respondent sent Petitioner a letter firing him for sexually harassing McGee. The person who authored the letter never testified at trial.

At trial, Ralph Terrell ("Terrell") testified that he fired Petitioner. Respondent's highest ranking manager to testify at trial, Stan Purvis, also testified that Terrell "probably" was the person who fired Petitioner and added that higher-level decision makers relied on lower-level managers, such as Terrell, when terminating employees. Respondent offered testimony that Ed Gill was its final decision maker. However, at no time did Respondent call Ed Gill, or any other self-proclaimed decision maker, to testify at trial.[4]

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[4] In another stunning departure from established legal principles, the appellate court resolved the dispute about who fired Petitioner in Respondent's favor. App. 4. According to the appellate court, "[t]he decision to terminate [Petitioner] was made by Ed Gill, the district manager." *Id.* Petitioner offered Terrell's and Purvis's testimony as evidence that Terrell – the same manager to whom Petitioner complained of race discrimination in November of 1998 – fired Petitioner.

(Continued on following page)

Petitioner also presented evidence that he did not engage in a terminable offense pursuant to Respondent's past practices and policies. First, pursuant to Petitioner's union contract, Respondent could fire him only for "just cause." The contract permits termination without written warning only for offenses called "cardinal sins" such as dishonesty, use of alcohol and/or drugs, carrying drugs or weapons, recklessness resulting in serious accident, failing to report an accident, carrying unauthorized passengers on the job, or engaging in unprovoked physical violence on company property or while on duty. Petitioner did not commit any of these offenses, yet Respondent fired him without written warning. Moreover, sexual harassment is not one of the "cardinal sins" listed. Second, when the same investigator, Purvis, who investigated Petitioner reviewed allegations that a non African-American driver exposed his penis to a customer, Purvis interviewed the driver and gave him an opportunity to explain what happened. During the interview, the driver resigned.

C. Decision of the Court of Appeals

The United States Court of Appeals for the Eleventh Circuit affirmed the trial judge's decision, but on different grounds. On appeal, Petitioner challenged the trial judge's decision based on this Court's decision in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711

Respondent offered other testimony from non-decision makers that its "official" chain of command dictated that final termination decisions were, in the abstract, made by district managers such as Ed Gill. The termination letter was not authored by Ed Gill. Gill never testified at trial.

(1983) which precludes the trial judge from revisiting the sufficiency of a *prima facie* case after the trial judge has denied a motion for judgment as a matter of law at the close of the evidence. The appellate court did not address the trial judge's erroneous post-verdict conclusion that Petitioner failed to establish a *prima facie* case. Instead, the appellate court conceded that Petitioner established a *prima facie* case, but held that Respondent was entitled to judgment as a matter of law because the employer claimed that its decision-maker – who did not testify at trial – believed that Petitioner committed a terminable offense.

REASON FOR GRANTING THE PETITION

This petition for certiorari arises from an extraordinary judicial usurpation of the role reserved to the jury by the Seventh Amendment to the Constitution. The trial judge's substitution of his judgment over that of the jury, on the issue of whether or not Petitioner established a *prima facie* case of retaliation, after submitting the matter to the jury and denying Respondent's Rule 50 motion at the close of all the evidence, negated four days of jury attention and deliberation, a substantial verdict for Petitioner on his retaliation claim, and eviscerated the right to a jury trial, by violating the precedent of this Court and of the Eleventh Circuit.

The appeals court did not address this issue, but instead decided the case on the purported grounds that the Respondent employer should escape the jury's verdict because the evidence was allegedly unrefuted that Respondent had a subjective good faith belief that Petitioner committed a terminable offense. To reach this strained

result, the appeals court distorted the evidence, and discounted Petitioner's evidence presented to the jury, ignoring this Court's restrictions imposed on this type of judicial activism, expressed most recently in *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000). Despite *Reeves*, trial judges and activist panels of courts of appeals around the country continue to nullify jury verdicts for prevailing minority plaintiffs in civil rights cases, such as here.

This case presents an opportunity for the Court to strike down the activist leanings of certain jurists who would purport to act as "super jurors" and eviscerate the right to a jury trial, and also to reiterate the very circumscribed nature of judicial review of jury findings and verdicts in employment discrimination and other civil trials. To not do so would result in the continued disregard by lower courts discontented by the holding of *Reeves*, resulting in the further evisceration of the Constitutional right to a trial by jury, a bedrock of American jurisprudence.

ARGUMENT

I. By substituting its view of disputed facts, and creating facts that did not exist in the record, the appellate court nullified the jury's verdict and violated Petitioner's right to a jury trial, as guaranteed by the United States Constitution

Effectively nullifying the Constitutional right to a trial by jury, expressed by the framers in the Seventh Amendment to the United States Constitution, the appellate court made up facts unsupported by the record, and

sitting as the proverbial seventh juror, "found facts" that either were never presented at the trial, or which the actual and true jury empaneled to decide the case rejected. This "super juror" function on the part of an activist panel of the Eleventh Circuit concerned more with the outcome than in a fair and evenhanded application of the law, flies in the face of this Court's caution to appellate courts to be more deferential to jury verdicts, a view most recently expressed in *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000). When considering whether to nullify a jury's verdict, not only must courts draw ***all*** inferences in favor of the party who won with the jury, it "must ***disregard all evidence*** *favorable to [the loser of the contest, in this case Respondent United Parcel Service]* ***that the jury is not required to believe***[.]" *Id.* at 151 (emphasis added). The end result in this case was to hijack a jury's verdict to rescue a politically well connected corporate entity that a jury found retaliated against Petitioner in violation of Title VII of the Civil Rights Acts of 1964 and 1991.

The problem that remains is this: years after *Reeves* was decided and this Court's faithful adherence to the right to a jury trial was confirmed, appellate panels, such as the one in this case, are simply ignoring *Reeves* by discounting evidence presented by the prevailing plaintiff, particularly in cases that involve racial minorities; these activist courts cull the record for evidence that a jury *could have*, but did not accept, so that the outcome can be changed to favor the losing corporate employer. This improper "super juror" function on the part of activist panels around the country not only violates the right to a jury trial, a right of constitutional proportions, it undermines faith in the judicial system and increases litigation

of cases that should be resolved because corporate defendants and their counsel know that even if a jury rejects their frivolous defenses, as here, judicial activists that do not particularly appreciate civil rights laws and their disposition by juries in a democratic society, are likely to rescue them, as here. The effect of this type of judicial nullification of the Seventh Amendment is that Title VII is not enforced, and the mandate of Congress that permitted jury disposition of Title VII claims with passage of the Civil Rights Act of 1991, has been effectively overruled by judicial fiat, as here. Such a result undermines our system of government and, in the end, permits activist judges to legislate from the bench and disregard Congressional acts with which the unelected judges do not agree.

Reeves teaches that only a jury can reject testimony for lack of credibility. *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 150 (2000). The appellate court in this case had no trouble getting around this fundamental and well entrenched principle of American jurisprudence by falsely claiming that

> . . . UPS established *without evidentiary dispute* that Cornelius made sexually suggestive comments to a customer during a routine delivery.[5] Cornelius offered *absolutely no evidence* to the contrary and, in fact, *conceded he made the*

[5] This judicial "finding" is not only disputed by the testimony of Petitioner, who denied such an act, but also by the testimony of Elvis Way, a fellow driver who visited the same facility and who testified that the customer in question was a person who regularly engaged in explicit and sexually inappropriate comments to and about multiple UPS drivers who visited the facility. Not surprisingly, the alleged offended "customer" never testified in the trial.

> *remarks.*[6] Significantly, aside *from his own speculation* about a racist conspiracy, Cornelius *did not produce any evidence* suggesting that UPS decision makers *lacked* a good faith belief that he made the sexually harassing remarks, or that such remarks did not constitute a discharge offense under the employer's past practice.

(Emphasis added). App. 7-8.

Therefore, the appeals court found, that under *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991), " . . . the proper inquiry for the court is not whether the employee was guilty of misconduct but whether the employer in good faith believed that the employee had done wrong (sic) and whether this belief was the reason for the termination." App. 8, n. 8. This last bit of analysis by the appeals court shifts the burden on a defense issue to the plaintiff, a particularly egregious bit of judicial manipulation in light of the fact that ***UPS failed to call any of its claimed decision-makers to trial to establish their alleged good faith belief in Petitioner's alleged culpability or their alleged belief in same***. Aside from

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[6] This mischaracterization of the evidence by the appeals court is astonishing. Petitioner spoke to the customer because she spoke to him about her husband cheating on her; he suggested that all men will cheat if they don't follow their marriage vows and she ought to consider marrying a black man instead (the customer was white, Petitioner is African-American). Petitioner did not in any manner sexually harass the customer, suggest that she have sex with him, or touch her in any way. While Charlie Fox offered testimony that differed from that of Petitioner, and while the Court permitted, over hearsay objection, Arlene Ramos, who did not witness the interaction, and who was the customer's supervisor, to testify about the incident, the jury was not compelled to accept their testimony as true, in the face of Petitioner's denials.

that flaw, Petitioner presented persuasive circumstantial evidence that the employer possessed a retaliatory motivation for terminating him, and even impeached the employer's "good faith belief" in his alleged misconduct by attacking the credibility of the "investigator" UPS elected to serve as its principle witness at trial, Stan Purvis. In addition, Petitioner presented the deposition of Ralph Terrell, the person who Petitioner alleged was the decision maker, and who admitted he was the decision maker. Mr. Terrell testified that he fired the Petitioner, and was a high level manager of the Riviera Beach hub. The testimony of Jeff Whitney, the individual supervisor Petitioner complained of for telling racist jokes insulting to African-Americans, testified that he did tell such jokes, and told them ***in the presence of Mr. Terrell for many years prior to his termination***. A reasonable jury could therefore conclude, as this one did, that by exposing Mr. Terrell's tolerance of Mr. Whitney's blatantly racist jokes in the workplace, Mr. Terrell had a motive to retaliate against the Petitioner and did so.

The appeals court apparently is of the impression that a reasonable jury is required to accept the corporate employer's version of who the decision-maker is, even if the decision maker doesn't bother to show up at trial. Again, the jury was not compelled to accept the argument of UPS, expressed by its counsel, but wholly unsupported from the witness stand, about: 1) who the decision maker was; or 2) that the alleged decision maker had an alleged good faith belief about Petitioner engaging in terminable

conduct. The appeals court improperly manufactured this "evidence" without any testimony to support it.[7]

However, even *Elrod*, which has spawned a great deal of judicial nullification of jury verdicts in the Eleventh Circuit, required the employer to put on evidence of its "good faith" belief in the employee's alleged misconduct, and to also present evidence that the belief was "reasonable." Here, no such evidence was ever presented to the jury, unless the closing argument of Respondent's counsel, thoroughly rejected by the trier of fact, is now considered evidence in the Eleventh Circuit. In fact, another panel of the Eleventh Circuit, recognizing the proper purpose of a trial and of the jury's function as fact finders in a trial, has restricted the misuse of *Elrod*.

In *Munoz v. Oceanside Resorts, Inc.*, 223 F.3d 1340 (11th Cir. 2000), a veteran employee with a previously spotless record was reprimanded on the alleged grounds of kissing a female co-employee and terminated subsequently for allegedly confronting another female employee who had signed off on the aforementioned reprimand, a charge Mr. Munoz denied. The employer, as here, argued that since it had presented a facially neutral reason for the discharge, insubordination to the person who reprimanded him, Munoz had failed to meet his ultimate burden of

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[7] Even if the decision-makers had testified about their alleged "good faith" belief in Petitioner's alleged transgressions, the jury, under *Reeves*, would in no way be compelled to accept this testimony, and could permissibly reject it. The fact that the decision-makers elected to not testify, and subject themselves to the truth exposing process of cross-examination, spoke volumes to the jury about the credibility or lack of the employer's case.

establishing pretext, and accordingly, the trial court had erred in submitting the case to the jury, and should have, accordingly, entered judgment for the employer under Rule 50, Federal Rules of Civil Procedure. The Court declined to accept this argument, focusing in " . . . on the evidence most critical to Munoz's satisfaction of this burden: ***Munoz's assertion that he did not engage in insubordinate conduct*** . . . A reasonable jury accordingly could accept Munoz's theory of events: that Gonzalez concocted a scheme that included both a bogus reprimand and a subsequent false accusation of insubordination to cover his discriminatory desire to discharge an older employee." *Id.* 1345-1346 (emphasis added).

Prior to the appeals court usurpation of the jury's function, the trial judge, the Honorable William Zloch, Chief Judge, Southern District of Florida, disposed of the case without even reaching the issue of pretext, instead grounding his nullification of the jury's verdict on the purported grounds that the Petitioner failed to make a *prima facie* case of retaliation. This ruling came approximately one year after the trial, and was made despite the fact that the trial judge had denied the Respondent's Motion for Judgment as a Matter of Law pursuant to Fed. R. Civ. P. 50, at the close of all the evidence and prior to turning the case over to the jury. The trial judge's ruling was contrary to well established precedent from this Court and even from the Eleventh Circuit, which may explain why the court of appeals panel elected a different justification for nullifying the jury's verdict.

The trial judge in this case violated well entrenched precedent in the Eleventh Circuit, deriving from this Court, that precludes the vacating of a jury award once the trial judge has determined that plaintiff has

established a *prima facie* case under Title VII. The law is quite explicit on this issue and not subject to any wiggle room. The trial judge's decision was wrong and constituted an abuse of judicial power because a trial judge cannot revisit whether the plaintiff made a *prima facie* case once it has considered, and denied, a Rule 50 motion at the close of the evidence and has sent the case to the jury for resolution. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714-715 (1983); *Beaver v. Rayonier, Inc.*, 200 F.3d 723 (11th Cir. 1999), *cert. denied*, 529 U.S. 1095 (2000); *Tidwell v. Carter Products*, 135 F.3d 1422, 1426, n. 1 (11th Cir. 1998); *Richardson v. Leeds Police Department*, 71 F.3d 801 (11th Cir. 1995).

The Eleventh Circuit panel completely ignored this Court's (and its own) explicit precedent on this issue and sought to re-frame the issue around the concept of pretext, which issue the trial judge never addressed. The dance performed by the Eleventh Circuit panel does violence to the concept of *stare decisis* and, is, again, an intellectually duplicitous effort to deprive a party of the right to his day in Court with a jury of his own peers. Fed. R. Civ. P. 50 and its misapplication in this case, abrogated, by judicial order, the Seventh Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the petition for writ of certiorari should be granted, the jury's verdict for the Petitioner reinstated, and the decisions of the appeals court and trial judge vacated and quashed.

Respectfully submitted,

ISIDRO M. GARCIA
GARCIA, ELKINS & BOEHRINGER, P.A.
The Harvey Building
224 Datura Street, Suite 900
West Palm Beach, FL 33401
(561) 832-8033 (telephone)
(561) 832-7137 (telecopier)
Florida Bar No. 437883

Counsel for Petitioner

Dated: September 2, 2002

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 02-11169

D. C. Docket No. 00-8123-CV-WJZ

ALPHONSO CORNELIUS,

Plaintiff-Appellant,

versus

UNITED PARCEL SERVICE, INC.,
a foreign corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(May 19, 2003)

Before EDMONDSON, Chief Judge, DUBINA, Circuit Judge, and HODGES*, District Judge.

PER CURIAM:

This Title VII case arises out of Appellant Alphonso Cornelius' claim that he was unlawfully discharged from

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* Honorable Wm. Terrell Hodges, United States District Judge for the Middle District of Florida, sitting by designation.

his employment as a delivery truck driver for United Postal Service, Inc. (UPS) in retaliation for complaining about racial discrimination. Following a jury verdict in favor of the Appellant, the district court granted UPS' motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b) and entered judgment in favor of UPS. Appellant Cornelius appeals the adverse judgment. We affirm.

I. Background

In 1988, Appellant Alphonso Cornelius ("Cornelius") became employed by the United Parcel Service, Inc. (UPS), a global package shipping company. Although Cornelius was initially employed in a part-time position in the warehouse unloading trucks, UPS promoted him to a full-time driver position in 1990. As a driver, Cornelius' duties included picking up packages from UPS' Boynton Beach facility and delivering them along different routes. Cornelius held this position for the next ten years, working approximately fifty (50) hours per week. During the early years of his employment, the only blemish on his record was an allegation of sexual harassment by a UPS customer in 1996.[1]

Cornelius reported directly to supervisor Jeff Whitney who was reputed to make racial slurs in the workplace. Indeed, at trial Whitney admitted to making ethnic, sexual, and racial jokes in the workplace. Although Cornelius did

[1] The record reflects that Cornelius was terminated based upon this prior accusation of sexual harassment, but was later reinstated following an investigation by his manager. (Doc. 85 at 28-32).

not hear Whitney make any such jokes until 1998, he was aware of Whitney's reputation for making racial remarks.

In the fall of 1998, Whitney made a racist remark including the slur "nigger" directly to Cornelius. Soon thereafter, Cornelius noticed that Whitney engaged in disparate discipline practices. Concerned about Whitney's conduct, Cornelius complained to the UPS manager in charge of the Boynton Beach facility, Ralph Terrell. Following an investigation by UPS management, Whitney admitted to making the racist remark and resigned under threat of termination.

Following this incident, Cornelius began to feel that he was being retaliated against by his co-workers. For example, Sylvester Howard, a black manager, told Cornelius that he could no longer associate with Cornelius because of his complaint about Whitney. Many UPS drivers ignored Cornelius and told him he shouldn't have reported Whitney's conduct. The fellow drivers shunned, harassed, and taunted Cornelius and he began to feel uncomfortable at work. Cornelius reported the retaliatory harassment to UPS managers, who counseled Cornelius about the situation. For a period of time, UPS managers also allowed Cornelius to report to work later in the day to avoid the early morning meeting of drivers.

Several months later, in April of 1999, a second sexual harassment complaint was made against Cornelius by a customer at AT&T. A manager for AT&T testified that one of her employees, Debra McGee, had reported an incident involving Cornelius making offensive and suggestive

sexual comments during a routine package pick-up. At trial, Cornelius admitted to making sexual remarks in McGee's presence.[2]

UPS investigated the allegation of sexual harassment, had two meetings with AT&T, and requested a second statement from Debra McGee. At the completion of the investigation, UPS terminated Cornelius' employment. The decision to terminate Cornelius was made by Ed Gill, the district manager.

II. Procedural History

On October 3, 2000, Cornelius brought suit against UPS in the United States District Court for the Southern District of Florida by filing a single-count complaint alleging Title VII retaliation. Cornelius' complaint alleged that he was unlawfully terminated in retaliation for complaining about Whitney's racist remarks.

The case was tried before a jury. The jury returned a verdict in favor of Cornelius and awarded him compensatory damages of $120,000 and punitive damages of $180,000. UPS responded by renewing its previously asserted motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b), and Rule 59 and 50(c) motions for new trial or remittitur.

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[2] Cornelius admitted at trial that he made the following remarks directly to McGee or in her presence: "Why don't you try a black guy?" "Do you have any black in you? Do you want some?" Cornelius also admitted to engaging in banter with McGee, including conversations about her divorce and sexual activities.

The district court granted UPS's Rule 50(b) motion, holding that there was insufficient evidence for a jury to conclude that Cornelius was retaliated against for engaging in a statutorily protected activity in violation of Title VII, and entered final judgment in favor of UPS. Cornelius now appeals the adverse judgment.

III. Discussion

Cornelius raises four issues on appeal and frames those issues in the following manner: (1) whether the trial judge erred in revisiting, after the verdict, the issue of Cornelius' engagement in protected activity; (2) whether Cornelius engaged in protected activity; (3) whether Cornelius was required to prove an underlying violation of Title VII to prevail under Title VII's anti-retaliatory provision; and (4) whether Cornelius presented direct evidence of retaliation.

In response, UPS argues that the judgment of the district court should be affirmed because the district court properly held that there was insufficient evidence for a reasonable jury to conclude that Cornelius was the victim of retaliation. Among other reasons, UPS contends that a reasonable jury could not have concluded that Cornelius was fired for any reason other than the AT&T employee's sexual harassment complaint. Because it is dispositive of the case, we will first turn to the argument raised by UPS.

UPS contends that the appropriate issue for consideration was whether UPS decision-makers believed that Cornelius committed the misconduct of which the AT&T employee complained. In other words, UPS argues that Cornelius failed to offer any evidence rebutting UPS' proffered legitimate non-retaliatory reason for the termination,

namely, that UPS had a good faith belief that Cornelius made inappropriate and sexually suggestive remarks to a customer. As UPS points out, Cornelius offered absolutely no evidence at trial contradicting UPS' position that its decision makers terminated Cornelius because of the sexually harassing conduct. In fact, Cornelius admitted making the sexually suggestive comments in the presence of the AT&T employee, and he offers no evidence that this behavior did not warrant his dismissal based upon UPS' past practice in comparative circumstances.

We believe that this case is controlled by our holding in *Gupta v. Florida Board of Regents*.[3] The facts and posture of *Gupta* are similar to those in this case. In *Gupta*, we reversed the District Court's denial of the Defendant's motion for judgment notwithstanding the verdict. The plaintiff, who was formerly employed by the Defendant as an assistant professor, had received a jury verdict in the district court in her favor on two claims: (1) that she had been subjected to a sexually hostile work environment; and (2) that she was retaliated against in a number of ways after complaining about the alleged harassment. With regard to the plaintiff's retaliation claim, we found that only two of the retaliatory actions complained of – the denial of a pay raise and the denial of an extension on her tenure clock – actually amounted to adverse employment actions.[4]

As to the denial of a pay raise, the Defendant established without evidentiary dispute at trial that its decision

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[3] 212 F.3d 571 (11th Cir. 2000).

[4] *Id.* at 590.

not to award the plaintiff a pay raise was based upon appropriate and objective criteria.[5] For example, it was not disputed that the Plaintiff had failed to publish anything and even acknowledged that she had accomplished little.[6] As to the denial of an extension on the Plaintiff's tenure clock, the Defendant established without evidentiary dispute that the Plaintiff's request for an extension was not justified and was, in fact, premature. Consequently, this Court determined that the Plaintiff had failed to present sufficient evidence of pretext to support the jury's verdict of retaliation. We held:

> Although Gupta satisfied the elements of a retaliation claim, the Board presented nondiscriminatory reasons for its actions. The meager evidence, or lack of it, produced by Gupta in response did not permit the jury to "legitimately draw the inference" that the Board's proffered nondiscriminatory reasons for its employment decisions were pretextual and that the real reasons behind their actions were retaliatory . . . No reasonable juror could have found that the Board retaliated against Gupta because she filed a complaint of sexual harassment.[7]

Like the Defendant in *Gupta*, UPS has proffered a legitimate, nonretaliatory reason for its decision to terminate Cornelius' employment. Specifically, UPS established without evidentiary dispute that Cornelius made sexually suggestive comments to a customer during a routine

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[5] *Id.*

[6] *Id.* at 591.

[7] *Id.* at 592, citations omitted.

delivery. Cornelius offered absolutely no evidence to they contrary and, in fact, conceded that he made the remarks. Significantly, aside from his own speculation about a racist conspiracy, Cornelius did not produce any evidence suggesting that UPS decision makers lacked a good faith belief that he made the sexually harassing remarks, or that such remarks did not constitute a discharge offense under the employer's past practice.[8]

In light of the evidence produced by UPS, and the lack of evidence produced by Cornelius, there was nothing upon which the jury could legitimately draw the inference that UPS' proffered non-retaliatory reason for its decision to terminate Cornelius was pretextual. Indeed, the Supreme Court's reasoning in *Reeves v. Sanderson Plumbing Products, Inc.*, a case relied upon by Cornelius, also commands this result, teaching that

> an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and

[8] *See E.E.O.C. v. Total Sys. Serve. Inc.*, 221 F.3d 1171, 1176 (11th Cir. 2000) (finding that the employer had demonstrated a legitimate non-discriminatory reason for the employee's discharge by showing that it had a good faith belief that the employee had lied during the company's internal investigation), *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991) (noting that the proper inquiry for the court is not whether the employee was guilty of misconduct but whether the employer in good faith believed that the employee had done wrong and whether this belief was the reason for the termination.).

> uncontroverted independent evidence that no discrimination had occurred.[9]

Consequently, we find that, although Cornelius satisfied the *prima facie* elements of a retaliation claim, he did not present evidence sufficient to overcome UPS' proffered legitimate non-retaliatory reason for his termination. There was no legally sufficient evidentiary basis upon which a reasonable juror could have found that UPS retaliated against the Plaintiff because he filed a complaint of racial discrimination. The District Court's decision granting UPS' motion for judgment as a matter of law is AFFIRMED, and the remaining issues raised by the Appellant are rendered moot.

IV. Conclusion

For the foregoing reasons, the judgment of the district court is AFFIRMED.

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[9] 530 U.S. 133, 148, 120 S.Ct. 2097, 2109 (2000).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 00-8123-CIV-ZLOCH

ALPHONSO CORNELIUS,

Plaintiff,

vs. **FINAL JUDGMENT**

UNITED PARCEL SERVICE, INC.,

Defendant.
_____/

THIS MATTER is before the Court upon the Defendant, United Parcel Service, Inc.'s Motion For Judgment As A Matter Of Law (DE 88). The Court has carefully reviewed said Motion and the entire court file and is otherwise fully advised in the premises.

The Plaintiff, Alphonso Cornelius, commenced the instant action seeking damages and injunctive relief against the Defendant, United Parcel Service, Inc., (hereinafter "UPS") for an alleged violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (hereinafter "Title VII"). Specifically, the Plaintiff alleges that the Defendant terminated his employment as a UPS driver in retaliation for his having opposed racial harassment in the form of (1) complaining of being told a racial joke by his supervisor, Jeff Whitney, the "punch line" of which was that both Tiger Woods and O. J. Simpson had the same nickname in high school – "nigger," and (2) being ostracized by his co-workers following Whitney's termination for telling this joke. This Court

has jurisdiction over the above-styled cause pursuant to 28 U.S.C. §§ 1331 & 1343.

The Court notes that this matter was tried before a jury in four days beginning on February 28, 2001 and concluding March 6, 2001. The Defendant moved for judgment as a matter of law at the close of the Plaintiff's case based upon the Plaintiff's failure to present sufficient evidence to support a claim of retaliation and the Court reserved ruling on this Motion. The Defendant renewed its Motion at the close of its case and again at the close of evidence. This Court denied the Defendant's Motion and the case was sent to the jury, which found for the Plaintiff. After the Court dismissed the jury, the Defendant renewed its Motion For Judgement As A Matter Of Law, which is now before the Court.

II. Standard For Rule 50 Motion

In addressing the Defendant's Motion For Judgment As A Matter Of Law, the Court has considered all of the evidence and the inferences drawn therefrom in the light most favorable to the non-moving party. If the facts and inferences point overwhelmingly in favor of one party, such that reasonable people could not arrive at a contrary verdict, the Motion for Judgment As A Matter Of Law should be granted. *Verbraeken v. Westinghouse Elec. Corp.*, 881 F.2d 1041 (11th Cir. 1989). Conversely, if there is substantial evidence opposed to the Motion such that reasonable people, in the exercise of impartial judgment, might reach different conclusions, then such Motion must be denied. *Miles v. Tennessee River Pulp and Paper Co.*, 862 F.2d 1525 (11th Cir. 1989). A mere scintilla of evidence does not create a jury question. Rather, there must

be a substantial conflict in the evidence to create a jury question. *Verbraeken,* 881 F.2d at 1045. The court may not weigh the evidence or decide the credibility of the witnesses. *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.,* 97 F.3d 436 (11th Cir. 1996).

The Court notes at the outset that the Plaintiff has raised two technical defenses to the Defendant's Rule 50 Motion. The first being that the Defendant cannot use this Motion to challenge the sufficiency of the Plaintiff's prima facie case and the second being that the Plaintiff has waived the right to argue one of the grounds raised in its Motion, that the Plaintiff failed to cooperate with the Defendant's investigation of his hostile environment complaint. The Court, however, finds that neither of these defenses bar the Defendant from making any of the arguments contained within the instant Motion. As to the first defense, the Court notes that the Defendant through the instant Motion challenges whether the Plaintiff has established the essential elements of his case and that this is a permissible ground upon which to grant a Rule 50 Motion. *See Davis v. Town of Lake Park, Florida,* 245 F.3d 1232, 1246 (11th Cir. 2001). As to the second defense, the Court notes that the Defendant properly raised this issue at the appropriate times during the trial by alleging that the Plaintiff had not established that he had engaged in a protected activity. *See Failure To Cooperate*, infra at pp. 16-18.

III. Retaliation

Section 2000e-3 of the Civil Rights Act of 1964 prohibits certain forms of employment discrimination by providing as follows:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3.

Initially, a plaintiff must establish a prima facie case of retaliation through one of two methods: (1) by direct evidence of discriminatory intent, or (2) by circumstantial evidence. *Simmons v. Camden County Bd. of Educ.*, 757 F.2d 1187, 1189 (11th Cir. 1985). In the instant case, the Plaintiff has attempted to rely on both forms of evidence in order to prove his prima facie case.

A. Direct Evidence

The Court notes that direct evidence is:

> [E]vidence, which if believed, proves the existence of a fact in issue without inference or presumption. Only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of race constitute direct evidence of discrimination. For statements of discriminatory intent to constitute direct evidence of discrimination, they must be made by a person involved in the challenged decision. Remarks by non-decisionmakers or remarks unrelated to the decisionmaking process itself are not direct evidence of discrimination.

Bass v. Bd. of County Comm'rs., 256 F.3d 1095, 1105 (11th Cir. 2001) (citations omitted).

Here, the testimony alleged by the Plaintiff to be direct evidence consists of statements attributed to Dave Hershberger, Dave Kolasa, Ralph Terrell, Dave O'Hanna, and Ken Sheppard. However, the evidence adduced at trial reveals that of these individuals only Ralph Terrell was involved in the decision to terminate the Plaintiff. (DE 85, at p. 203). Therefore, the statements of these other individuals cannot be considered direct evidence. Moreover, as to the statements attributed to Hershberger and Kolasa, the Court finds that these statements would not amount to direct evidence even if these individuals had participated in the decision to terminate the Plaintiff as they fail to establish the existence of a fact in issue without the need for inference or presumption.

As to the statement attributed to Ralph Terrell, the Plaintiff testified that another individual, UPS supervisor Sylvester Howard, told the Plaintiff that Ralph Terrell had told him that he shouldn't "hang out" with the Plaintiff because the Plaintiff was "the guy that got Jeff Whitney fired," and that consequently, Mr. Howard should "be careful." (DE 84, at p. 142). The Court finds that this statement does not constitute direct evidence as it is subject to several interpretations and requires both a presumption and an inference in order to prove the existence of a fact in issue. Specifically, in order to find that this statement proved the existence of a fact in issue, a jury would need (1) to presume that Terrell meant that UPS was angry with the Plaintiff because of the Whitney incident and that Terrell felt that Howard would be wise not to associate with an individual who had incurred UPS's wrath, and then (2) to infer from this presumption that UPS's anger over the Whitney incident was the motivation for the Plaintiff's subsequent termination.

Without drawing the aforementioned presumption and inference this statement could as easily be interpreted as a warning to Howard that he, as a supervisor, should be wary of the Plaintiff as the Plaintiff had previously caused another supervisor to lose his job. Consequently, this statement fails to rise to the level of direct evidence.

B. Circumstantial Evidence

Absent direct evidence, the Plaintiff must rely instead upon circumstantial evidence in order to prove his prima facie case. To establish a prima facie case of retaliation a plaintiff must first prove each of the following elements: (1) that he engaged in statutorily protected expression; (2) that he suffered an adverse employment action; and (3) that a causal link exists between the protected expression and the adverse action. *Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1336 (11th Cir. 1999).

The Court notes that the United States Supreme Court has devised a three-step procedure known as the "*McDonnell-Douglas* Shifting-Burden Test" to analyze circumstantial evidence by creating inferences of discriminatory intent. *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under the *McDonnell-Douglas* test, a plaintiff is first required to create an inference of discriminatory intent by establishing a prima facie case of retaliation. If he cannot do so, the defendant need not present any reason for its action and the Court must determine if the plaintiff has met his burden. *Hawkins v. Ceco Corp.*, 883 F.2d 977 (11th Cir. 1989). If the plaintiff cannot meet his burden of establishing each element of a prima facie case, the Court must find in favor of the defendant.

If a plaintiff succeeds in presenting a prima facie case of retaliation, the burden then shifts to the defendant to rebut the created presumption of discrimination. The rebuttal consists of articulating some legitimate, non-discriminatory reason for the employment action. This is not a burden of proof or persuasion, but is more appropriately called a burden of production. If the defendant fails to rebut a plaintiff's prima facie case, then the plaintiff has prevailed and need not proceed with an additional showing.

Once the defendant has met its burden of production, however, the burden then shifts back to the plaintiff to prove, by a preponderance of the evidence, that discriminatory intent motivated the employer's action. This may be done by demonstrating that the employer's proffered explanation is pretextual, or alternatively, by directly demonstrating that a discriminatory reason more likely motivated the employer's action. Therefore, despite the shifting-burden analysis, the ultimate burden of proof remains throughout on the plaintiff. *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 253 (1981).

1. Statutorily Protected Activity

Turning to the first element of the Plaintiff's prima facie case, engaging in a statutorily protected activity, the Court notes that Title VII's anti-retaliation provision recognizes two forms of statutorily protected conduct. *Clover v. Total Sys. Servs., Inc.,* 176 F.3d 1346, 1350 (11th Cir. 1999). An employee is protected from discrimination if (1) he has opposed any practice made an unlawful employment practice by this subchapter (the opposition clause) or (2) he has made any charge, testified, assisted,

or participated in any manner in an investigation proceeding, or hearing under this subchapter (the participation clause). *Id.* Here, the Plaintiff asserts that he satisfies this element under both the participation and opposition clauses. The Court disagrees.

a. The Participation Clause

As to the participation clause, the Plaintiff asserts that he falls within its protection as he participated in the internal UPS investigation of the Whitney incident and because he participated in an internal UPS investigation of UPS drivers who had ostracized him. The Court notes, however, that the participation clause of Title VII's anti-retaliation provision protects only proceedings and activities which occur with or after the filing of a formal charge with the EEOC and that this clause does not protect participation in an employer's internal in-house investigation conducted apart from a formal charge with the EEOC. *EEOC v. Total Sys. Servs., Inc.,* 221 F.3d 1171, 1174 (11th Cir. 2000). Thus, as the Plaintiff's participation in these in-house investigations occurred prior to and apart from the Plaintiff's formal charge with the EEOC, these activities fail to bring the Plaintiff within the protective umbrella of Title VII's anti-retaliation provision.

b. The Opposition Clause

Regarding the opposition clause, the Plaintiff asserts that it applies to him as he (1) complained about a racial joke made by his supervisor, Jeff Whitney, and (2) because he complained that other UPS drivers were ostracizing him. In order to fall within the opposition clause's protection, the Plaintiff must establish that he had a good faith

reasonable belief that his employer was engaged in an unlawful employment practice. *Little v. United Techs.,* 103 F.3d 956, 960 (11th cir. 1997). The Plaintiff's burden under this standard has both a subjective and an objective component. *Id.* In other words, the Plaintiff must not only establish that he subjectively believed that his employer was engaged in an unlawful employment practice, but also that his belief was objectively reasonable in light of the facts and record presented. *Id.*

This is not to say that the Plaintiff need prove that the conduct he opposed was actually unlawful in order to establish this element. *Id.* Rather, the Plaintiff must merely show that an individual with substantive knowledge of the law could have reasonably believed that the opposed employment practice was unlawful. *Clover v. Total Sys. Servs., Inc.,* 176 F.3d 1346, 1351 (citing *Harper v. Blockbuster Entm't Corp.,* 139 F.3d 1285, 1388 n.2 (11th Cir. 1998), *cert. denied,* 525 U.S. 1000 (1998). Therefore, where, as here, the Plaintiff claims he was retaliated against for having opposed being subjected to a hostile environment based upon his race, the Court must consider whether a reasonable person could have believed that the Plaintiff was the victim of an unlawfully hostile environment.

To establish a hostile environment claim a plaintiff must demonstrate that "the racially derogatory remarks of the defendant were commonplace, overt, and denigrating and so pervasive and shocking in this more enlightened day that they altered the conditions of employment and created an abusive working environment for blacks." *EEOC v. Beverage Canners, Inc.,* 897 F.2d 1067, 1070 (11th Cir. 1990). In deciding whether a hostile environment exists, a court considers (1) the frequency of the

discriminatory conduct, (2) its severity, (3) whether the conduct was threatening or humiliating, and (4) whether the conduct unreasonably interferes with the plaintiff's performance at work. *Edwards v. Wallace Comty. Coll.*, 49 F.3d 1517, 1521-22 (11th Cir. 1995). This high standard for judging hostility is designed to filter out complaints "attacking the ordinary tribulations of the workplace, such as the sporadic use of offensive language, . . . jokes, and occasional teasing," so as to ensure that Title VII does not become a "general civility code." *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

Turning to the conduct opposed by the Plaintiff, the Court finds based upon the current state of hostile environment law that, regardless of the Plaintiff's subjective beliefs, a reasonable person could not have believed that the Plaintiff had been subjected to an unlawfully hostile environment. Addressing first the Plaintiff's ostracism by his co-workers, the Court notes that Title VII protects only against harassment based upon a protected characteristic. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998). The Court further notes that the evidence in this case establishes that the plaintiff was not ostracized because of his race, but rather because he was resented by co-workers for causing Jeff Whitney's termination. The Court notes that the Plaintiff testified as follows:

> Q: What happened immediately following the – your reporting Mr. Whitney for this comment?
>
> A: Well, I wasn't treated the same. I was – a lot of people stopped speaking to me, and the friends I had before the whole eleven years I was there stopped speaking. You know, they just didn't think it was safe to be around me, or they just started making comments, derogatory comments

> saying that I shouldn't have told, and why did I have to tell. You know, stuff like that.

(DE 84 at pp. 139-40).

As his testimony illustrates, the Plaintiff's co-workers did not start ostracizing him until after he had complained against Whitney. In fact, no evidence exists suggesting that the Plaintiff experienced any such ostracism at any time during his eleven year tenure with the Defendant prior to that complaint. Moreover, his testimony also reveals that the Plaintiff's co-workers specifically told him that they were ostracizing him for reporting Whitney. The Plaintiff emphasized this fact repeatedly in his testimony, stating variously that: (1) co-workers told him "that I shouldn't have reported Jeff Whitney," (2) "[t]hey stopped speaking to me, you know, saying they going to get me back," and (3) that "they said they going to get me back for getting Jeff fired." *Id.* at pp. 140-41.

Indeed, the only connection at all that the Plaintiff draws between this ostracism and his race is that Gene Chandler, one of the drivers who told him to expect retribution for Whitney's termination, had also asked him "if black skin gets hot in the sun." *Id.* at p. 141. The Court fails to see how a reasonable person could draw an inference of racial animus from this innocuous remark. To bridge the gap between this statement and the conclusion that the Plaintiff was being ostracized because of his race would require a greater inferential leap than a reasonable person could make. Accordingly, as the Plaintiff did not experience any ostracism until after he had complained against Whitney and because the Plaintiff's co-workers told him that this ostracism was occurring because he had reported Whitney, the Court finds that no reasonable

person could have believed that this treatment was because of the Plaintiff's race. Therefore, as no reasonable person could have believed that this ostracism was race based and because Title VII protects only against harassment based upon protected characteristics, the Court concludes that no reasonable person having a knowledge of the law could have believed that the ostracism the Plaintiff experienced amounted to an unlawful employment activity. While perhaps an argument could be advanced that this treatment was part of an adverse employment action suffered by the Plaintiff because of his complaint against Whitney, this treatment provides no support for the Plaintiff's position that he objectively believed he was the victim of an unlawfully hostile environment.

Furthermore, even assuming, arguendo, that the Plaintiff's co-worker's were solely motivated by his race and that they had merely used Whitney's termination as a convenient pretext under which to manifest their bigotry, this would still not make reasonable the Plaintiff's belief that he was the victim of a hostile work environment. Faced with similar allegations of ostracism, other courts have consistently held that a "cold shoulder" of this type fails to have the severity or pervasiveness necessary to create an actionably hostile work environment. *Drake v. Minn. Mining & Manufacturing Co.,* 134 F.3d 878 (7th Cir. 1998); *Ross v. Glickman,* 1997 WL 603895, *4 (9th Cir. 1997) (unpublished opinion), *Strother v. S. Cal. Permanante Med. Group,* 79 F.3d 859, 869 (9th Cir. 1996); *Washington v. Bd. of Trs. of Comty. Coll. Dist.,* 509, 2001 WL47006, *4 (N.D.Ill. 2001). The Court finds this to be particularly true where, as here, the Plaintiff has testified that he told the Defendant's agents who were investigating

his ostracism claim that he was "okay" and that he "could handle" the cold shoulder he was receiving. (DE 85, at pp. 47-49).

Regarding the racial joke told by Whitney, the Court finds that a reasonable person could not believe, based upon this incident either, that the Plaintiff had been subjected to an unlawfully hostile work environment. The Court notes that it is a near black-letter principle of hostile environment law that a single incident of harassment will not create an unlawfully hostile environment unless it is extraordinarily severe. *Harrison v. Eddy Potash, Inc.*, 248 F.3d 1014, 1024 n.5 (10th Cir. 2001); *Raniola v. Bratton*, 243 F.3d 610, 620 (2nd Cir. 2001); *Brooks v. City of San Mateo*, 229 F.3d 917, 926 (9th Cir. 2000). The Court further notes that other courts have consistently held that conduct far more severe and pervasive than that alleged by the Plaintiff falls short of the hostile environment standard. *Johnson v. Bunny Bread*, 646 F.2d 1250, 1257 (8th Cir. 1981), (Both Supervisors and co-workers had referred to the Plaintiffs as "niggers"); *Gullatte v. Westpoint Stevens, Inc.*, 100 F.Supp.2d 1315, 1317 (N.D. Tex. 2000), (supervisors referred to the Plaintiff using the term "nigger" three times during the course of his employment); *Padilla v. Carrier Air Conditioning*, 67 F.Supp.2d 650, 660 (E.D. Tex. 1999), (supervisor told co-worker that she had a dog trained to bite blacks); *Langley v. AT&T Wireless Services, Inc.*, 1998 WL 792498, *3 (N.D. Tex. 1998), (co-worker told Plaintiff that she had a gun and had no problem shooting "black nigger bitches" and supervisor referred to African Americans using the terms "bro" and "mammy" and told Plaintiff she was not invited to his pool party because he saw no reason why she would want to sunbathe); *Powers v. Dallas County Comm.*

Coll. Dist., 1997 WL 446442, *3-4 (N.D. Tex. 1997), (supervisor responded to Plaintiff's hysterectomy with a comment about black females being spayed, told a joke about black people being in prison, remarked that Dr. Martin Luther king's dream remained unfulfilled as black people were still enslaved, and referred to herself as a slave driver); *Smith v. Beverly Health And Rehabilitation Services, Inc.*, 978 F.Supp. 1116, 1121-22 (N.D. Georgia 1997), (supervisor said of Plaintiff, in presence of Plaintiff and four other people, that "all that mooly can do is make coffee and bring it to me," and stated outside of Plaintiff's presence that "these goddamn Georgia niggers think they own Georgia," and that "where I come from niggers knew their place"); *Grant v. UOP, Inc.*, 972 F.Supp 1042, 1045 (W.D. Louisiana 1996), (supervisor referred to two employees as "cotton patch niggers" and co-workers stated that "niggers can't weld," said "nigger, please," and asked the Plaintiff "if he knew the difference between a 'nigger' and a 'black man'"); *McCray v. DPC Industries, Inc.*, 942 F.Supp. 288, 290 (E.D. Tex. 1996), (supervisor referred to Plaintiff as "son" and "black Yankee," made two racial jokes in Plaintiff's presence, and co-workers told a racial joke in Plaintiff's presence and addressed him as a "God damned nigger" on one occasion). Accordingly, based upon the high threshold the courts have set on hostile environment claims, this Court finds that no reasonable person with a substantive knowledge of the law, having been told Whitney's racial joke, could have believed that he had just been made the victim of an unlawfully hostile work environment. Indeed, the Court finds that this incident falls so far short of creating a hostile environment, that even if the ostracism the Plaintiff subsequently experienced was race-based, these events combined would still be insufficient to create a reasonable belief that a racially hostile environment

existed at UPS. *See McConathy v. Dr. Pepper/Seven Up Corp.*, 131 F.3d 558, 563, (5th Cir. 1998), (stating that "the Court will not elevate a few harsh words or 'cold-shouldering' to the level of an actionable offense").

c. Failure To Cooperate

Even assuming arguendo, however, that the Plaintiff's belief that he was the victim of an unlawfully hostile work environment was objectively reasonable, the Court would still conclude that the Plaintiff had failed to engage in a statutorily protected activity. The Court notes that to qualify for Title VII protection, the manner in which an employee expresses his opposition to unlawful conduct must be objectively reasonable. *Rollins v. State of Florida Dep't. of Law Enforcement,* 868 F.2d 397, 401 (11th Cir. 1989). This reasonableness determination is made by balancing the purpose of the statute and the need to protect individuals asserting their rights thereunder against an employer's legitimate need for loyalty, cooperation, and a generally productive work environment. *Id.*

Here, the record reveals that during the Defendant's internal investigation of the Plaintiff's complaint against Jeff Whitney the Plaintiff (1) refused to commit himself to a written statement regarding the incident, and (2) refused to identify the only other witness to this incident. (DE 84, at pp. 135-138). The Court finds that these failures to cooperate render the manner in which the Plaintiff expressed his opposition objectively unreasonable. The Court notes that hostile environment liability often hinges entirely on whether a defendant acts promptly to halt harassment by its agents, *Coates v. Sundor Brands, Inc.*, 164 F.3d 1361, 1369 (11th Cir. 1999), and further notes

that the manner in which the Plaintiff asserted his complaint was such that it could have frustrated the Defendant's ability to investigate and remedy the alleged harassment. Thus, while the Court would find the manner in which the Plaintiff complained objectively unreasonable regardless of the activity he was complaining of, the Court finds his complaint particularly unreasonable as he was, in fact, complaining of a hostile environment. The Court notes that other courts, considering similar fact situations, have reached the same outcome. *See Smith v. Alabama Dep't. of Pub. Safety,* 64 F.Supp.2d 1215, 1233-34 (M.D. Alabama 1999); *DuPont-Lauren v. Schneider (USA), Inc.,* 994 F.Supp. 802, 823 (S.D. Texas 1998); *Bray v. Tenax Corp.,* 905 F.Supp. 324, 328 (E.D. North Carolina 1995).

Therefore, based on all the testimony and evidence at trial, the Court finds that there is insufficient evidence for a jury to conclude that the Plaintiff was retaliated against for engaging in a statutorily protected activity in violation of Title VII. The Court finds that the facts and inferences point overwhelmingly in favor of the Defendant such that reasonable people could not arrive at a contrary verdict, and that the Defendant is entitled to judgment as a matter of law for this reason as well.

Accordingly, after due consideration, it is

ADJUDGED as follows:

1. That the Defendant, United Parcel Service, Inc.'s Motion For Judgment As A Matter Of Law (DE 88), be and the same is hereby **GRANTED**. Final Judgment be and the same is hereby entered in favor of the Defendant, United Parcel Service, Inc., and against the Plaintiff, Alphonso Cornelius. Said Plaintiff shall take nothing by

this action, and said Defendant shall go hence without day [sic]; and

2. To the extent not otherwise disposed of herein all pending motions are hereby **DENIED** as moot.

ADJUDGED in Chambers at Fort Lauderdale, Broward County, Florida, this 30th day of January, 2002.

/s/ William J. Zloch
WILLIAM J. ZLOCH
Chief United States
District Judge

Copies furnished:

Isidro M. Garcia, Esq.
For Plaintiff

Michael F. McAuliffe, Esq.
For Defendant

(2)

No. 03-347

Supreme Court, U.S.
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In The
Supreme Court of the United States

ALPHONSO CORNELIUS,

Petitioner,

v.

UNITED PARCEL SERVICE, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

LUCINDA A. HOFMANN
Counsel of Record
KELLY-ANN CARTWRIGHT
HOLLAND & KNIGHT LLP
701 Brickell Avenue
Miami, Florida 33131
(305) 374-8500

Counsel for Respondent United Parcel Service, Inc.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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RESTATEMENT OF THE QUESTION PRESENTED

Whether the appellate court erred in affirming the district court's grant of the Employer's motion for judgment as a matter of law after a jury trial, where the Employer produced a legitimate, non-retaliatory reason for terminating the Employee (sexual harassment of an employee of one of the Employer's largest customers); the Employee presented no evidence that the customer's employee did not report the harassment or believe she was harassed and no evidence that the Employer did not believe the customer's employee or the customer's supervisor who reported the harassment to the Employer's management; and the Employee himself admitted to making sexually suggestive remarks in the presence of the customer's female employee.

CORPORATE DISCLOSURE

United Parcel Service, Inc., a Delaware corporation, is the ultimate parent of United Parcel Service, Inc., an Ohio corporation. United Parcel Service, Inc., a Delaware corporation, is the only UPS-related entity that has outstanding common stock issued in a public offering. United Parcel Service, Inc., a Delaware corporation, and United Parcel Service of America, Inc., a Delaware corporation, have outstanding debt securities that were issued in public offerings.

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, United Parcel Service, Inc. ("UPS"), requests that this Court deny the Petition for Writ of Certiorari ("Pet.") filed by Alphonso Cornelius, seeking review of the unpublished decision of the U.S. Court of Appeals for the Eleventh Circuit, affirming the district court's judgment as a matter of law for UPS.

RESTATEMENT OF THE CASE AND FACTS

A. The Proceedings Below

1. The Verdict and Rule 50(b) Motion

The plaintiff/petitioner, Alphonso Cornelius ("Cornelius"), sued his employer, United Parcel Service, Inc. ("UPS"), on a single claim of retaliation. The retaliation claim was tried to a jury, which, after a four-day trial, returned a verdict for Cornelius. After the verdict was returned, UPS renewed its Rule 50(b) motion for judgment as a matter of law, arguing, among other things, that no reasonable fact-finder could determine from the evidence presented that Cornelius had proved his retaliation case. Agreeing with UPS, the district court granted UPS's motion, concluding that "based on all the testimony and evidence at trial, . . . there is insufficient evidence for a jury to conclude that [Cornelius] was retaliated against for engaging in a statutorily protected activity in violation of Title VII." (Pet. App. 25.) It then entered judgment for UPS, ruling that "the facts and inferences point overwhelmingly in favor of [UPS] such that reasonable people could not arrive at a contrary verdict." (Pet. App. 25.)

2. The Appeal

Cornelius appealed to the Eleventh Circuit. After briefing and oral argument, the appellate court affirmed the final judgment for UPS. Agreeing with the district court, the panel concluded that Cornelius "did not present evidence sufficient to overcome UPS'[s] proffered legitimate non-retaliatory reason for his termination" (Pet. App. 9) because "[i]n light of the evidence produced by UPS, and the ***lack of evidence produced by Cornelius***, there was nothing upon which the jury could legitimately draw the inference that UPS'[s] proffered non-retaliatory reason for its decision to terminate Cornelius was pretextual." (Pet. App. 8; emphasis added.) Following the reasoning of this Court in *Reeves v. Sanderson Plumbing Products, Inc.*,[1] the court held that "[t]here was no legally sufficient evidentiary basis upon which a reasonable juror could have found that UPS retaliated against [Cornelius] because he filed a complaint of racial discrimination." (Pet. App. 9.)

B. The Undisputed Facts

The petitioner, Alphonso Cornelius, drove a package delivery truck for United Parcel Service from 1990 until he was terminated in 1999. His UPS supervisors and customers considered him a good driver and employee. He had only one notable blemish on his record, and that was an allegation of sexual harassment lodged against him by a UPS customer in 1996. Based on this accusation, Cornelius was terminated. He grieved the termination through his union's grievance process and was reinstated.

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[1] 530 U.S. 133 (2000).

Two years later in November 1998, Cornelius, an African-American, received a warning letter for having a minor accident with his truck. That same day, or the next, Cornelius reported to Ralph Terrell, the business manager, that his supervisor, Jeff Whitney, had told him a racist joke that offended him.[2] Without delay, UPS managers investigated Cornelius's allegation. Despite Cornelius's refusal to cooperate in the investigation, UPS managers sought Whitney out and confronted him. When Whitney admitted telling Cornelius the offensive joke, UPS gave Whitney, a 23-year employee, the option of resigning or being fired. Whitney resigned.

After Whitney's resignation, Cornelius was shunned by his fellow package truck drivers who, according to Cornelius, also threatened to get him back for getting Whitney fired. Cornelius told his supervisors about the shunning and asked one supervisor to allow him to start work later in the morning to avoid being around the other drivers. He was allowed to for a brief period. On several occasions, UPS supervisors asked Cornelius how he was managing. He told all of them that he was okay and could handle the situation.

Five months later, in April 1999, a second sexual harassment complaint was lodged against Cornelius, this time by AT&T, a very important UPS customer. AT&T manager, Arlene Ramos, testified that one of her reports,

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[2] In his petition to this Court, Cornelius also claims that, at the time, he also complained that Whitney did not give a warning letter to a white driver who had had a similar accident. But Cornelius did not mention this alleged "discrimination" in his retaliation Complaint against UPS.

Debra McGee, came to see her because she did not want to work the loading dock that evening. McGee told Ramos about a conversation she had had with Cornelius during one of his pick-ups. Ramos had McGee type up a statement of what was said. Because McGee reported that Cornelius had said a disgusting thing to her about a sexual act, Ramos reported the incident to AT&T Human Resources and to UPS. When Ramos spoke to Dave O'Hanna, a manager at UPS, she told him that she thought Cornelius needed help and that she did not want him back in her facility.

At trial Cornelius admitted that he had conversed with McGee about her divorce. He admitted that he told her "all men cheat and they will have more women" and that he said "why don't you try a black guy." He also admitted to saying, "Do you have any black in you? Do you want some?" He testified that he addressed this remark to his co-worker Charlie Fox, but conceded that McGee was present when he said it.

UPS investigated the allegation – as it had the previous allegation against Cornelius and as it had Cornelius's complaint about Whitney's racist joke. UPS had two meetings with AT&T and requested a second statement from McGee. Terrell took Cornelius out of service pending the investigation. At the end of the investigation, UPS terminated Cornelius by sending him a discharge letter signed by UPS Division Manager, Dave Kolasa. The letter informed Cornelius that he was being discharged for just cause for sexual harassment.

Cornelius grieved his termination, which ended up before a deadlock panel comprising one union representative and one UPS representative. The termination was upheld.

Cornelius then sued UPS, claiming that UPS had retaliated against him by terminating him for complaining about Whitney's discriminatory and derogatory comments.

REASONS FOR DENYING THE PETITION[3]

I. The Eleventh Circuit's Unpublished Opinion Does Not Create Precedent or Conflict, and Its Holding Is Limited to the Facts of This Case

Under Eleventh Circuit Local Rule 36-2, "[u]npublished opinions are not considered binding precedent." U.S. Ct. App. 11th Cir. R. 36-2. Therefore, regardless of whether the Eleventh Circuit erred (and, as we will show, it did not), its opinion is of little, if any, precedential value and

[3] If for no other reason, this Court should deny Cornelius's petition because he used it to improperly and inappropriately impugn the integrity of the Eleventh Circuit by accusing it (falsely) of "distort[ing] the evidence" (Pet. at 13), "ma[king] up facts unsupported by the record" (Pet. at 13), finding facts that "were never presented at trial" (Pet. at 14.), and "improperly manufactur[ing]" evidence. (Pet. at 18.) Cornelius further maligned the Eleventh Circuit by accusing it of being "concerned more with the outcome than in a fair and evenhanded application of the law" and of "hijack[ing] a jury's verdict to rescue a politically well connected corporate entity." (Pet. at 14.) And then with a broad, and very malicious, brush, Cornelius condemned "appellate panels, such as the one in this case," for "discounting evidence presented by the prevailing plaintiff, particularly in cases that involve racial minorities." (Pet. at 14.) We submit that nothing the Eleventh Circuit wrote in its opinion or held in this case justified this vilification. It is one thing to say that a court has overlooked, misapprehended, or misinterpreted facts. It is something else entirely to accuse a court of distorting evidence and manufacturing nonexistent facts (Pet. at 13, 18), of manipulating the outcome to favor one party (Pet. at 14), and of "intellectual[ ]" duplicity. (Pet. at 20.)

thus does not warrant this Court's review. And because the unpublished opinion does not create binding precedent, it cannot be said to conflict with any decision of this Court or of any other court.

Nonetheless, Cornelius suggests that the opinion conflicts with *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). To the contrary, the Eleventh Circuit correctly applied well-established standards for reviewing judgments as a matter of law and correctly applied the teaching and reasoning of *Reeves* to the very fact-specific circumstances surrounding Cornelius's discharge. (Pet. App. 8-9.) The unique facts of this case and the absence of any new interpretation or expansion of existing law make the Eleventh Circuit's opinion one that this Court should decline to review.

II. Cornelius Merely Seeks Error Correction

Cornelius petitioned this Court for only one reason: he believes that the district and appellate courts erred in countermanding the jury's verdict. Thus, he comes to this Court seeking error correction. But this Court "do[es] not grant a certiorari to review evidence" or to "discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Yet this is precisely what Cornelius is asking this Court to do. The only way this Court could address Cornelius's argument that the Eleventh Circuit "substitut[ed] its view of disputed facts, and creat[ed] facts that did not exist in the record" (Pet. at 13) would be to review the evidence and discuss the facts. This Court does not do this because its "certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases."

Watt v. Alaska, 451 U.S. 259, 275 n.5 (1981) (Stevens, J., concurring).

Although Cornelius doesn't understand it, both courts ruled against him because he failed to carry his burden to prove that UPS's reason for discharging him was false and because no rational fact-finder could conclude that his discharge was retaliatory.

III. Under *Reeves*, UPS Was Entitled to Judgment As A Matter of Law Because Cornelius Presented Insufficient Evidence That UPS's Reason For Discharging Him Was A Pretext For Retaliation

It appears that Cornelius's argument to this Court is three-fold. First, he seems to be saying that because he denied that he sexually harassed Debra McGee and because the jury, ostensibly, believed him, he carried his burden to prove that UPS's given reason for terminating him was pretextual. (Pet. at 15 n.5; 16 n.6.) Second, he claims that because "UPS failed to call any of its claimed decision-makers to trial to establish their alleged good faith belief" that he harassed McGee, UPS did not carry its (supposed) burden to prove that the termination was based on its good faith belief that he had committed sexual harassment. (Pet. at 16.) And third, raising a theory for the first time, he says that because he complained about Whitney's racist joke to Ralph Terrell in November 1998 – thereby purportedly exposing Terrell's tolerance of Whitney's racism – and it was Terrell who took him out of service in April 1999, the jury was free to infer that

Cornelius was terminated as a result of Terrell's retaliation.[4] (Pet. at 17.)

Cornelius's arguments show that he lacks an understanding of the plaintiff's burden in a retaliation case.

A. Cornelius Admitted to Engaging in Conversations of a Personal and Sexual Nature

Although Cornelius tells this Court that he "did not in any manner sexually harass the customer" (Pet. at 16 n.6) and thus the Eleventh Circuit "mischaracteriz[ed]" the evidence when it stated that he "conceded he made the [sexually suggestive] remarks" (Pet. at 16 n.16; 15-16), here is what the trial transcript shows:

> The Court: Did you and Mr. [Charlie] Fox talk with Miss McGee?
>
> Cornelius: Yeah, we talked with Miss McGee. . . . She was a part of the conversation

---

[4] This was not Cornelius's theory at trial. There was no evidence that Terrell, or any other UPS supervisor or manager, was mad at him for getting Whitney fired. Cornelius's theory at trial was that his ***co-workers*** were mad at him for getting Whitney fired. But, of course, this theory does not work in a retaliation claim because his co-workers had no authority or ability to terminate him. *See, e.g., Reynolds v. Land O'Lakes, Inc.*, 112 F.3d 358, 364 n.6 (8th Cir. 1997) (noting that opinions of non-decisionmakers are insufficient to establish pretext). It also does not work because, although Terrell took Cornelius out of service pending the investigation of AT&T's complaint, Cornelius was officially terminated in a discharge letter signed by Dave Kolasa. Because Cornelius raises this theory for the first time here, we will not address it further in this opposition brief.

because she came over when Fox and I was talking.

* * *

Attorney: And then you said to the – to Miss McGee at the AT&T facility, "Why don't you try a black man," isn't that correct?

Cornelius: Yeah, We were talking about a marriage, and I said, "Why don't you try a Black guy."

* * *

Attorney: All right. Now, you also have stated and admitted that you made the statement, "Do you have any Black in you? Do you want some?" That you made that statement correct?

Cornelius: To Charlie.

Attorney: But you say that it was to Charlie Fox, the other UPS driver, and not to Miss McGee, is that correct?

Cornelius: Well, me and Charlie always had the conversation. She always came over where we were, or where I were and then when Charlie came she appeared again. So any conversation we had she came over. We didn't come to her. I didn't come to her.

(Rec. Doc 85 – Pgs 55, 57.) As this Court can see, Cornelius admitted that he made the sexually suggestive remarks and that McGee was present when he made them. Thus, the Eleventh Circuit did not mischaracterize Cornelius's testimony.

Even though Cornelius denied making the statements *to* McGee, his subjective, self-serving testimony does not provide sufficient evidence to undermine UPS's reason for his discharge. *See Hall v. Gary Cmty. Sch. Corp.*, 298 F.3d 672, 676 (7th Cir. 2002). It was undisputed that Debra McGee complained to her supervisor, Arlene Ramos, about these and other statements Cornelius made in her presence and gave two written reports that were used in UPS's investigation of her complaint. Cornelius offered no evidence that McGee did not complain or was not offended by his statements. He offered no evidence that Ramos did not believe McGee or report the incident to AT&T and UPS management. He offered no evidence that UPS did not investigate the complaint or believe both women. *See, e.g., Burns v. Check Point Software Techs., Inc.*, No. 3:01-CV-1906-P, 2002 WL 31455598, at *13 (N.D. Tex. Oct. 31, 2002) (noting that the plaintiff presented no evidence suggesting that the customer complaints were fabricated or that the employer mischaracterized or misconstrued the nature of the complaints; and stating that the employer was entitled to believe what it wanted to about the customer complaints). He offered no evidence that UPS did not rely on McGee's written statements and on Ramos's report in discharging him. *See id.* (entering summary judgment for the employer where the plaintiff did nothing to discredit the employer's reliance on customer complaints in deciding to terminate him).

Because Ramos was a disinterested witness and because Cornelius did not contradict or impeach her testimony, the Eleventh Circuit was permitted to accept her statements as true. *See Reeves*, 530 U.S. at 151 (quoting 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2529, at 300 (2d ed. 1995)). Given

Cornelius's lack of evidence of the falsity of UPS's legitimate, non-retaliatory reason for terminating him, "no rational factfinder could conclude that [his termination] was [retaliatory]." *Reeves*, 530 U.S. at 148.

B. The Plaintiff, Not the Defendant, Carries the Burden of Proving That Retaliation, Not the Legitimate Reason Given, Motivated the Employer

An appellate court reviews the district court's grant of judgment as a matter of law for the defendant *de novo*, viewing the evidence and drawing reasonable inferences in the plaintiff's favor. *See Hall v. Gary Cmty. Sch. Corp.*, 298 F.3d 672, 675 (7th Cir. 2002). The court's "inquiry is not to second-guess the jury's view of the contested evidence, but to determine whether, given the totality of the evidence, [the plaintiff] presented the jury with legally sufficient evidence from which it could conclude in his favor." *Id.* (citing *Massey v. Blue Cross-Blue Shield*, 226 F.3d 922, 925 (7th Cir. 2000)). The appellate court must view the evidence and the inferences that may be taken from it in the light most favorable to the party against whom the judgment was granted. *Massey*, 226 F.3d at 924. But when, in reviewing the evidence in this proper light, the court finds that the nonmoving party did not introduce enough evidence to support his claim, "judgment as a matter of law is correct." *Id.*

Thus, on review of the judgment for UPS, the only issue before the Eleventh Circuit was whether Cornelius had met his burden of proving sufficient evidence that UPS's stated reason for terminating his employment was pretextual and that the real reason he was discharged was to retaliate against him for complaining about Whitney's

racist remarks. *See Hall*, 298 F.3d at 675 (citing *Reeves*, 530 U.S. at 146-49; *Massey*, 226 F.3d at 925). "*Reeves* clearly mandates a case-by-case approach, with [the] court examining the entire record to determine whether the plaintiff could satisfy his 'ultimate burden of persuading the trier of fact' " that the employer retaliated against him. *Schnabel v. Abramson*, 232 F.3d 83, 90 (2d Cir. 2000) (quoting *Reeves*, 530 U.S. at 143). Thus, the ultimate burden of proof "remains at all times with the plaintiff." *Reeves*, 530 U.S. at 143 (quoting *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).

Nonetheless, in his petition to this Court, Cornelius, instead of showing how he satisfied ***his*** burden of proving pretext,[5] claims that it was UPS's burden to prove that ***it*** had a "good faith" belief that Cornelius committed the "alleged transgressions." (Pet. 18, 18 n.7.) What he fails to comprehend is that the law imposed on UPS only one burden: the burden to ***produce*** an "honest explanation of its behavior." *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991) (quoting *Mechnig v. Sears, Roebuck & Co.*, 864 F.2d 1359, 1365 (7th Cir. 1988)). Nothing required UPS to give the explanation through its "decision-makers' " testimony as to their "good faith" beliefs. *See Burns*, 2002 WL 31455598, at *7 ("[The] burden on the employer is one of production only, not

[5] An employee may demonstrate that his employer's reasons are unworthy of credence by showing "through evidence" that 1) the proffered reason had no basis in fact; 2) the proffered reason did not actually motivate his discharge; or 3) the proffered reason was insufficient to motivate discharge. *Mechnig v. Sears, Roebuck & Co.*, 864 F.2d 1359, 1365 (7th Cir. 1988).

persuasion, and involves no credibility assessments.") (citing *Reeves*, 530 U.S. at 142).

UPS was permitted to, and did, give an honest explanation of its behavior through the testimony of Arlene Ramos, who believed McGee's complaint serious enough to report it to AT&T's Human Resources department and to UPS's management. It is undisputed that she told UPS that she did not want Cornelius back in her facility. UPS, through Stan Purvis, its security officer, investigated the complaint and met with AT&T personnel twice before it decided to terminate Cornelius. Although Cornelius was "taken out of service" and assigned to the warehouse pending UPS's investigation of the complaint against him, he was not discharged for sexual harassment until the end of April, when Purvis had completed his investigation.

Thus, UPS carried its burden, but Cornelius did not carry his. Cornelius presented no evidence showing that the reason he was discharged – sexual harassment of an employee of an important UPS customer – had no basis in fact. *See Mechnig*, 864 F.2d at 1365. And he presented no evidence showing that the customer's complaint of sexual harassment did not actually motivate his discharge, or that the sexual harassment complaint was insufficient to motivate discharge. *See id.*

The facts of *Munoz v. Oceanside Resorts, Inc.*, 223 F.3d 1340 (11th Cir. 2000), are nothing like the facts here. In *Munoz*, the plaintiff was reprimanded for kissing a female co-worker. Munoz, a sixty-four-year-old Cuban-American, had been employed for twenty-seven years and during that time had never before received a reprimand. Although he did not specifically admit to the incident that brought about his first reprimand, he admitted that it was his

practice to greet female co-workers with a kiss, but maintained that his employer knew about this practice and had never objected to it and that no female employee had ever complained about it.

Munoz alleged that his termination, which was purportedly based on his failure to obey an instruction not to discuss his reprimand with anyone, was really a pretext for age discrimination. Munoz, unlike Cornelius, offered extensive evidence on the issue of pretext: In his twenty-seven years of employment, he had never received a documented reprimand. *Id.* at 1345 n.5. Munoz's employer knew of his kissing practice but never admonished him for it. *Id.* Munoz was terminated following a single warning. *Id.* Munoz's reprimand was written in English, a language Munoz did not understand. *Id.* And Munoz's younger replacement had received several reprimands during the course of his employment. *Id.*

Here, Cornelius, unlike Munoz, had previously received a customer complaint of sexual harassment. And even though a customer complaint of sexual harassment was not one of the "offenses called 'cardinal sins,'" UPS terminated him pending investigation. (Pet. at 11.) Here, even though race-based remarks were not one of the "offenses called 'cardinal sins,'" UPS terminated Whitney, without a warning, when he admitted telling Cornelius the offensive joke. (Pet. at 11.) UPS's first termination of Cornelius, its forced termination of Whitney for racial remarks, and its forced termination of another driver accused of indecent exposure (Pet. at 11) – all without *any* warning, showed that it even-handedly treated all such transgressions as dischargeable offenses and that it

treated Cornelius no differently than it treated other employees. These facts easily distinguish *Munoz*.

CONCLUSION

Reeves teaches that a plaintiff's prima facie case of discrimination combined with ***sufficient*** evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision ***may*** be adequate to sustain a finding of liability for intentional discrimination. *Reeves*, 530 U.S. at 148. Here, Cornelius presented ***no evidence*** that would allow the jury to reject UPS's nonretaliatory reason for terminating him. It was undisputed that McGee was offended by his remarks and reported them to her supervisor Ramos. It was undisputed that Ramos thought the incident serious enough to report to AT&T and UPS. It was undisputed that Ramos told UPS she didn't want Cornelius back in her facility. It was undisputed that Stan Purvis, a UPS security officer, met with Ramos twice at AT&T and interviewed McGee. It was undisputed that UPS relied on McGee's statements and Ramos's complaint in discharging Cornelius. There was no evidence that UPS conspired with AT&T or concocted a bogus explanation for terminating Cornelius. Without presenting evidence that UPS's reason for firing him was false, Cornelius did not carry his burden of proving

pretext, and thus judgment as a matter of law was correctly entered for UPS.

Respectfully submitted,

LUCINDA A. HOFMANN
Counsel of Record
KELLY-ANN CARTWRIGHT

HOLLAND & KNIGHT LLP
701 Brickell Avenue
Miami, Florida 33131
(305) 374-8500

Counsel for Respondent
United Parcel Service